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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN MARTIN FIGUEROA,

Defendant and Appellant.

B279062

Los Angeles County
Super. Ct. No. BA441336

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed and remanded with directions.

Dan Mrotek, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Yun K. Lee and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Juan Martin Figueroa of one count of first degree murder with a true finding that he personally and intentionally discharged a firearm causing great bodily injury or death. The trial court sentenced Figueroa to a total term of 50 years to life in prison. On appeal, Figueroa contends the court prejudicially erred when it precluded a witness from testifying at the hearing on Figueroa's new trial motion. Figueroa argues the witness's testimony was critical to establishing a claim that the People violated his right to compulsory process under the state and federal Constitutions by misrepresenting that the witness was unavailable to testify at trial. Figueroa also argues we should remand this matter for resentencing to allow the trial court to exercise its discretion to impose or to strike his firearm enhancement under Penal Code¹ section 12022.53, subdivision (h), which was recently amended by Senate Bill No. 620 (S.B. 620). We remand the matter for resentencing in light of S.B. 620 but otherwise affirm the judgment.

FACTUAL BACKGROUND

Figueroa, Frank Martinez, Art Gomez, and Jesus Rendon were members of the State Street gang based in the Boyle Heights neighborhood of Los Angeles. During the evening of November 30, 2011, Figueroa, Martinez, and about three other men and two women were hanging out in the front yard of a house on City View Avenue in Boyle Heights.

¹ All undesignated statutory references are to the Penal Code.

Gomez, who was driving with several other people in his car, stopped in front of the house and said “what’s up” to the group of people standing outside. Gomez then drove away and dropped off some of his passengers before returning to the house. Gomez walked up to the front yard and started throwing punches at some of the people standing in front of the house. The group did not immediately fight back.

Gomez walked away from the group and made a phone call. Shortly after Gomez made the call, Rendon drove up and parked his car outside the house. Gomez and Rendon met up in the street. They then walked back toward the house, at which point Rendon threw up his hands and said “what’s up” to the group standing outside.

As Gomez and Rendon walked toward the house, Figueroa and Martinez started shooting at them. Figueroa shot Rendon several times, killing him. Gomez was also shot several times and later died from his injuries.

PROCEDURAL BACKGROUND

In December 2015, the People charged Figueroa with two counts of murder (§ 187, subd. (a) [count 1 – Gomez; count 2 – Rendon]). As to both counts, the People alleged Figueroa personally and intentionally discharged a firearm causing death or great bodily injury (§ 12022.53, subds. (b)–(d)). The People also alleged that counts 1 and 2 together constituted a multiple-murder special circumstance (§ 190.2, subd. (a)(3)).

Figueroa’s first trial began in February 2016. In March 2016, the court declared a mistrial after the jury deadlocked one to eleven in favor of not guilty on count 1, and two to ten in favor of not guilty on count 2.

Figueroa's second trial began in June 2016. The jury found Figueroa guilty of first degree murder on count 2 and found true the firearm enhancement as to that count; the jury acquitted Figueroa of count 1.

In September 2016, the court denied Figueroa's motion for a new trial. The court sentenced Figueroa to a term of 50 years to life in prison, consisting of 25 years to life on count 2, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d).

Figueroa filed a timely notice of appeal.

DISCUSSION

1. The trial court properly denied Figueroa's motion for a new trial.

In his new trial motion, Figueroa argued the People violated his right to compulsory process under the state and federal Constitutions when they claimed Fernando Ibarra, a witness who testified at Figueroa's first trial, had avoided appearing as a witness at the second trial. Figueroa sought to call Ibarra as a witness at the hearing on the new trial motion to testify about whether he had in fact avoided testifying at the second trial. The court denied Figueroa's request.

On appeal, Figueroa contends the court's refusal to allow Ibarra to testify at the new trial hearing precluded Figueroa from establishing whether the People violated his right to compulsory process. Figueroa asks us to conditionally reverse his judgment and remand the matter for a new hearing on his new trial motion. We reject Figueroa's claim because regardless of whether the People falsely represented that Ibarra was unavailable to appear as a witness during their case-in-chief at the second trial,

Figueroa made no attempt to secure Ibarra's testimony for his own defense.

1.1. Applicable Law and Standard of Review

The Sixth Amendment to the United States Constitution and Article I, section 15, of the California Constitution guarantee a criminal defendant the right to compel the attendance of witnesses on the defendant's behalf. (*People v. Jacinto* (2010) 49 Cal.4th 263, 268–269 (*Jacinto*).) “The right of an accused to compel witnesses to come into court and give evidence in the accused's defense is a fundamental one. As the high court has explained: ‘The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. The right is a fundamental element of due process of law.’ [Citation.]” (*Ibid.*)

The prosecution can infringe a defendant's right to compel witnesses to testify in a number of ways, such as by threatening to prosecute a witness for any crimes he or she reveals or commits while testifying, or by arresting “‘a defense witness before he or other defense witnesses have given their testimony.’ [Citation.]” (*Jacinto, supra*, 49 Cal.4th at p. 269.) To establish a claim that the prosecution violated a defendant's right to compulsory process, the defendant must prove: (1) prosecutorial misconduct; (2) the prosecutor's misconduct was a substantial cause in preventing the defendant from calling the witness to

testify; and (3) the testimony the defendant was unable to present was material to his defense. (*Id.* at pp. 269–270.)

Unlike most other Sixth Amendment rights, the protections afforded by the right to compulsory process do not arise automatically out of the initiation of the adversary process. (*Jacinto, supra*, 49 Cal.4th at p. 273.) “While those [other] rights shield the defendant from potential prosecutorial abuses, the right to compel the presence and present the testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution’s case. The decision whether to employ it in a particular case rests solely with the defendant. The very nature of the right requires that *its effective use be preceded by deliberate planning and affirmative conduct.*” (*Ibid.*, quoting *Taylor v. Illinois* (1988) 484 U.S. 400, 410.) Thus, to establish a claim for violation of one’s right to compulsory process, the defendant must “take an active role in ensuring the presence of his witnesses.” (*Jacinto, supra*, 49 Cal.4th at p. 273.)

A defendant may move for a new trial on the ground that the prosecutor committed prejudicial misconduct during trial. (§ 1181, subd. (5).) “ ‘We review a trial court’s ruling on a motion for a new trial under a deferential abuse-of-discretion standard.’ [Citations.] ‘ “A trial court’s ruling on a motion for new trial is so completely within that court’s discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.” ’ [Citations.]” (*People v. Thompson* (2010) 49 Cal.4th 79, 140.)

1.2. Relevant Proceedings

Ibarra testified as a witness to the shooting during the People’s case-in-chief at Figueroa’s first trial. At a hearing before Figueroa’s second trial, one of the prosecutors informed the court

that she had spoken to the jurors who had served on the first trial. Several of the jurors believed discrepancies between Ibarra's testimony and the testimony of Brittany Garcia, another witness to the shooting, contributed to the jury deadlocking on counts 1 and 2. The prosecutor told the court she believed "those discrepancies that were highlighted are things that can be addressed by other evidence in the case more effectively the second time around."

During opening statements in Figueroa's second trial, the prosecutor told the jury it would hear testimony from Ibarra. According to the prosecutor, Ibarra wouldn't be able to identify any of the shooters, but he would provide an account of the shooting that is "consistent with and corroborates" the testimony of two other witnesses.

Toward the end of the People's case-in-chief, the prosecutor informed the court that she was having "some serious difficulties trying to reach out to [Ibarra]." The prosecutor indicated the People would rest without calling Ibarra as a witness.

Defense counsel stated he was surprised the People were prepared to rest because Ibarra was their "star witness." Defense counsel asked the court to continue the trial to the next day to allow him to finish preparing Figueroa's defense. The court instructed the prosecutor to "rest in front of the jury" and stated it would allow the People to reopen their case the next day if they were able to contact Ibarra.

The next day, Figueroa presented his defense. Figueroa never told the court he wanted Ibarra to testify as a witness for his defense, nor did Figueroa ask the court to make a finding that Ibarra was unavailable to appear as a witness.

Before his sentencing hearing, Figueroa filed a new trial motion, in which he argued, among other things, that the People violated his due process rights by concealing Ibarra's whereabouts and withholding Ibarra's testimony. Figueroa explained that, after trial, one of his investigators contacted Ibarra, who claimed he had always cooperated with the People and had been in contact with one of the their investigators through the end of the second trial. But for the People's assertion during trial that they could not contact Ibarra, Figueroa insisted he would have called Ibarra to appear as a defense witness. According to Figueroa, Ibarra's testimony was material to his defense because Ibarra "was the only person with a clear view of what transpired[, and,] [i]n his testimony from the first trial, he states that [] Figueroa was not present and was not the person involved in the incident."

In September 2016, the court heard Figueroa's new trial motion. Figueroa acknowledged he never informed the court or the People during the second trial that he wanted Ibarra to appear as a witness for his defense. When the court questioned why Figueroa never asked the court to make a finding that Ibarra was unavailable to appear at the second trial, defense counsel replied, "I could have said something, but I couldn't believe this person was evading process when this person was a witness that had assisted them in the preparation for the first trial."

Figueroa requested that the court allow him to call Ibarra as a witness at the hearing on the new trial motion to testify "whether, in fact, he evaded process, as the prosecution has represented to this court; or whether, in fact, he was available." After denying Figueroa's request, the court denied his motion for

a new trial, explaining: “I am not persuaded. I just don’t think that this is an issue that rises to a level for a motion for new trial, especially since the witness had previously testified and there was the obvious remedy of asking that the witness’s testimony be read into the record if it was that important.”²

1.3. Analysis

Figueroa has failed to show the court erred in denying his request to have Ibarra appear as a witness at the hearing on the new trial motion. Even if we were to assume that Ibarra’s testimony would have shown some form of prosecutorial misconduct, Figueroa cannot establish any violation of his right to compulsory process because he made no attempt during trial to secure Ibarra’s testimony for his defense. As noted above, Figueroa never informed the court or the People that he wanted to call Ibarra as a witness during the second trial. (See *Jacinto*, *supra*, 49 Cal.4th at p. 273 [the defendant must “take an active role in ensuring the presence of his witnesses”].)

To the extent Figueroa claims he reasonably relied on any representations the People may have made about Ibarra’s availability in deciding not to attempt to call Ibarra as a defense witness at the second trial, such reliance would not support a claim for violation of Figueroa’s right to compulsory process. As the court explained during the hearing on Figueroa’s new trial motion, other mechanisms were available to Figueroa through

² It is also unclear whether Ibarra could have testified at the new trial hearing. For example, Figueroa’s counsel stated that he “could simply have Mr. Ibarra come before this court and articulate whether, in fact, he evaded process,” and that Ibarra “is a person [who] is not unreachable[;] Mr. Alvaro has been in contact with [Ibarra].”

which he could have attempted to secure Ibarra's testimony. For example, Figueroa could have informed the court he intended to call Ibarra as a witness and requested a continuance to allow Figueroa additional time to locate Ibarra and secure his presence at trial. Accordingly, even if the court erred by not allowing Ibarra to testify at the hearing on the new trial motion, the error was harmless under *Chapman v. California* (1967) 386 U.S. 18, 24.

Because Figueroa failed to take any steps before or during trial to secure Ibarra's testimony for his defense, he cannot show his right to compulsory process was violated by any misrepresentations the People may have made about Ibarra's availability to testify at the second trial. (See *Jacinto, supra*, 49 Cal.4th at pp. 273–274.) We therefore conclude the court did not err when it denied Figueroa's request to have Ibarra testify at the hearing on Figueroa's new trial motion.

2. Remand is necessary for resentencing in light of S.B. 620.

In his reply brief, Figueroa argues we should remand this case for a new sentencing hearing to allow the court to exercise its discretion to impose or to strike his firearm enhancement under recently amended section 12022.53. (Stats. 2017, ch. 682.) At the time it sentenced Figueroa, the court was required to impose any firearm enhancements found true under sections 12022.5 and 12022.53. (See former §§ 12022.5, subd. (c) [“Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.”]; 12022.53, subd. (h) [same], amended by Stats. 2017, ch. 682, § 2.) After S.B. 620 went into effect on January 1, 2018, however,

sentencing courts may exercise discretion under sections 12022.5, subdivision (c), and 12022.53, subdivision (h), to “strike or dismiss an enhancement otherwise required to be imposed by” those statutes if doing so would be “in the interest of justice pursuant to Section 1385.” (§§ 12022.5, subd. (c); 12022.53, subd. (h).) Because S.B. 620 is “ameliorative legislation which vests trial courts with discretion, which they formerly did not have, to dismiss or strike a prior serious felony conviction for sentencing purposes[,]” it applies retroactively to all cases, such as this one, that were not final when it went into effect. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972–973.)

As the People acknowledge, the matter must be remanded for a new sentencing hearing to allow the court, in the first instance, to exercise its discretion to impose or to strike Figueroa’s firearm enhancement under section 12022.53, subdivision (h). In remanding the matter for resentencing, we offer no opinion on how the court should exercise its discretion under that statute.

DISPOSITION

The judgment of conviction is affirmed. Figueroa's sentence is vacated and the matter is remanded for the limited purpose of allowing the court to exercise its sentencing discretion under section 12022.53, subdivision (h), as amended by SB 620.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.